JD–37–21
Waxahachie, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

OWENS CORNING INSULATING SYSTEMS, LLC

and **CASE 16–CA–266880**

JOHN S. MURRAY, an Individual

Linda Reeder, Esq., for the General Counsel.
Bindu Gross, Esq. **and** ***Rodolfo Agraz, Esq.***
(Ogletree, Deakins, Smoak & Stewart), of Dallas, Texas,
and ***Kara Maruszak, Esq.***, of Toledo, Ohio, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on May 6, 2021, by videoconference. After the parties rested, I adjourned the hearing until June 24, 2021, when it resumed by conference call for oral argument. The hearing resumed again on June 25, 2021, and I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In accordance with Section 102.45 of those Rules, I hereby certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The conclusions of law and the order sections of the decision are set forth below.

CONCLUSIONS OF LAW

1. The Respondent, Owens Corning Insulating Systems, LLC[2], is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The bench decision appears in uncorrected form at pages 161 through 176 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification. For brevity, I refer to the Acting General Counsel simply as the General Counsel.

[2] The Respondent's name appears here as corrected by amendment to the complaint during the hearing.

2. The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL CLC, Local 201M[3], is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[4]

ORDER

The complaint is dismissed.

Dated Washington, D.C. July 13, 2021

Keltner W. Locke
Administrative Law Judge

[3] The Union's name appears here as corrected by amendment to the complaint during the hearing.

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The complaint in this case alleges that Respondent's supervisors made two unlawfully threatening and/or coercive statements. Because I do not credit the testimony offered to prove these allegations, I recommend that the Board dismiss the complaint.

Procedural History

This case began on September 29, 2020, when the Charging Party, John S. Murray, an individual, filed the original unfair labor practice charge against the Respondent, Owens Corning Insulating Systems, LLC. This charge was docketed as Case 16–CA–266880. The Charging Party amended the charge on October 21, 2020.

After an investigation, the Regional Director for Region 16 of the Board issued a complaint against Respondent on February 19, 2021. On March 3, 2021, the Respondent filed an answer, which the Respondent amended on May 4, 2021.

On May 6, 2021, a hearing opened before me by videoconference. At the beginning of the hearing, the General Counsel moved to amend the complaint to correct the names of the Respondent and the Union. I granted that unopposed motion, and use the corrected names of the Respondent and the Union in this decision.

The parties completed the presentation of evidence on May 6, 2021, and I then adjourned the hearing until June 24, 2021, when it resumed telephonically for oral argument. I then recessed the hearing until today, June 25, 2021, when it resumed for delivery of this bench decision.

Admitted Allegations

Complaint paragraph 1 alleges that the charge in this proceeding was filed by the Charging Party on September 29, 2020, and a copy was served on Respondent by U.S. mail on September 30, 2020. In its amended answer, the Respondent admits that the charge was filed and served but does not admit the dates of filing and service. Based upon the Respondent's admission and the certificate of service, which is not disputed, I find that the charge was filed and served as alleged in the complaint.

The Respondent's amended answer admits certain of the allegations raised in complaint paragraphs 2, 3, and 4. Based on those admissions, I find that the Respondent is a Delaware corporation and operates a place of business at 3700 N Interstate 35 E., Waxahachie, Texas.

Further, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Additionally, I conclude that it satisfies the Board's discretionary standards for the assertion of jurisdiction.

Complaint paragraph 5 alleges that at all material times, the Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC, Local 201M, has been a labor organization within the meaning of Section 2(5) of the Act. The Respondent's amended answer states, in part, that it "is without knowledge or information sufficient to form a belief as to the truth of the averments of this Paragraph including subparts and to what time period '[a]t all material times' refers, and therefore denies the allegations." However, Respondent's amended answer does admit that "it is informed and believes" that the Union is a labor organization within the meaning of Section 2(5) of the Act."

It would be surprising if the Respondent did not believe that the Union was a labor organization. The Respondent is a party to a collective–bargaining agreement with the Union, and that agreement has been in effect at all material times. Specifically, it took effect on November 1, 2018, and will remain in effect until November 1st of this year. This contract includes the following language:

The Company recognizes the Union as the sole and exclusive collective bargaining representative for all of its hourly production, maintenance and warehouse and shipping employees working on job classifications listed in Schedule A at its plant located in Waxahachie, Texas.

The language of the Respondent's amended answer—that it was "without knowledge or information sufficient to form a belief" as to whether the Union was a labor organization—seems a bit surprising, considering that the Respondent already had recognized the Union and entered into a collective-bargaining agreement with it. However, in view of the Respondent's admission that it had been informed and believed that the Union was a labor organization, and based on the recognition clause in the collective-bargaining agreement, I conclude that the General Counsel has proven the allegation raised in complaint paragraph 5.

Complaint paragraph 6 alleges that at all material times, Human Resources Leader Sarah Havens and Operations Leader Nick Conklin were supervisors of the Respondent, and its agents, within the meaning of Sections 2(11) and 2(13) of the Act, respectively. The Respondent's amended answer admits that between January 1, 2020, and August 1, 2020, Havens and Conklin were its supervisors, within the meaning of Section 2(11), and its agents within the meaning of Section 2(13) of the Act. I so find.

The complaint alleges that the Respondent, through Havens and Conklin, made coercive and/or threatening statements to employees on about July 3, 2020, and on about July 9, 2020, respectively. In view of the Respondent's admission, I conclude that any statements which Havens and Conklin may have made to employees on or about these dates would be imputable

to the Respondent.

The Alleged Unfair Labor Practices

Charging Party Murray is an employee of the Respondent and a member of the bargaining unit represented by the Union. On about June 27, 2020, the Respondent suspended Murray.

The record indicates that a supervisor had instructed Murray to take a blood pressure test and Murray refused to do so. Management considered this refusal to be an act on insubordination warranting discharge.

The complaint does not allege that the Respondent violated the Act by suspending Murray. The lawfulness of that suspension is not in issue in this case.

Rather, the complaint alleges that management officials made unlawful statements to the union president and vice president when they inquired about how long Murray's suspension would last.

Before discussing these allegations, it may be helpful to discuss how the Union becomes involved when the Respondent suspends, and considers discharging, a bargaining unit employee. Article 4, Section 1 of the collective-bargaining agreement states, in part, as follows:

Where circumstances require supervision to consider discharge, the employee will, in all cases, be suspended in the presence of a Union Representative. During the suspension period of no longer than four (4) of the employee's working days (three (3) for employees working twelve (12) hour shifts) the Company will conduct an investigation of the incident.

During the suspension period, the Company will meet with the designated Local Union Business Committee person to discuss the facts of the case. . .

This contract term thus allows the Union to be involved in the representation of an employee at an early stage, before final disciplinary action is taken. Union representatives can begin their efforts to resolve the underlying issue even before the filing of a written grievance.

At this stage, union representatives can seek to prevent a contemplated disciplinary action. If they do not succeed, they later can try to persuade management to rescind the discipline. If their efforts are unsuccessful, they can then ask an arbitrator to overturn the discipline.

This contract clause thus functions, in effect, as part of the negotiated grievance resolution procedure. Indeed, Article 7, Section 1 of the collective-bargaining agreement states, in part:

The Company and Union encourage the union representative and the supervisor to discuss the grievance prior to reducing the grievance to writing.

The complaint concerns statements allegedly made at this early stage—while management was still contemplating what discipline to impose—by the Respondent's regional human relations manager and by its operations leader, or manager.

Complaint Paragraph 7(a)

Complaint paragraph 7(a) alleges that about "July 3, 2020, Respondent, by Human Resources Leader Sarah Havens, made coercive statements and/or threatened employees with termination if the Union wanted an answer on an employee's discipline instead of giving her more time to investigate." The Respondent denies this allegation.

Union President Steven Butler, who is also an employee of the Respondent, testified that on about July 2, 2021, he and Union Vice President Randy May spoke with Human Resources Leader Sarah Havens concerning Murray's suspension. This conversation took place in the human resources department. According to Butler, he and May asked Havens how long Murray's suspension would last:

> Q. Can you be more specific, please?
> A. Yes, we were talking about the three–day timeframe and we talked to Sarah, and Ms. Havens said the time — basically, if we filed a contract [sic], you will not like my decision at this time.

It is apparent from context that when Butler said, "if we filed a contract," he meant if they filed a grievance.

The General Counsel interprets the words attributed to Havens to mean that if the Union insisted that the Respondent abide by the 3-day time limit described in Article 4, Section 1 of the collective-bargaining agreement, the Respondent would discharge Murray rather than impose some lesser discipline.

For clarity, it may be noted that Murray works 12-hour shifts. For employees working such shifts, Article 4, Section 1 of the contract limits the suspension period to 3 days.

The General Counsel argues that Havens made a veiled threat to discharge Murray if the Union insisted that the Respondent abide by the contractual time limit. The General Counsel reasons that since the Act protects an employee's right to insist that an employer follow the collective-bargaining agreement, threatening retaliation for the exercise of this right is an unfair labor practice.

Union Vice President Randy May also testified concerning this July 2, 2020 meeting with Havens. According to May, "Ms. Havens stated she needed more time and if we pushed

the issue on the timeframe, we would not like the outcome."

Havens testimony contradicts that of Butler and May. She testified that she was not at the plant on either July 2, 2020, or July 3, 2020. Additionally, she denied ever making a threat to terminate an employee because the Union would not allow more time to investigate before taking a contemplated disciplinary action.

For several reasons, I do not credit the testimony of Butler and May. Rather, crediting Havens testimony, I find that she never made the statement they attributed to her.

On cross–examination, Butler admitted that his pretrial affidavit did not mention any meeting with Havens on July 2, 2020. Rather, Butler stated in that affidavit "on July 3rd, 2020 I had an impromptu meeting with HR Havens in her office. It's currently skeleton crew due to Covid–19."

This one difference between Butler's testimony and his pretrial affidavit by itself would not raise an insurmountable doubt concerning the accuracy of his testimony. However, there were other discrepancies.

At the hearing, Butler testified that after their meeting with Havens, he and May called Murray. Butler further testified that during this call, he told Murray that if Murray didn't agree to giving the Respondent additional time to investigate, "they're going to fire your ass." However, on cross–examination, Butler admitted that his pretrial affidavit did not describe such a call to Murray.

Butler stated in his affidavit that on July 7, 2020, he exchanged text messages with Operations Leader Conklin. However, when shown the messages during cross–examination, Butler admitted that this exchange took place on July 6, 2020.

Butler testified that he later had a meeting with Conklin, at which he asked Conklin to meet with Murray. However, Butler admitted on cross–examination that his pretrial affidavit did not refer to such a meeting.

In connection with the allegation raised by complaint paragraph 7(b), discussed below, Butler gave testimony concerning a meeting he had with Operations Leader Conklin. He attributed to Conklin a threat to terminate Murray's employment if the Union filed a grievance. However, at one point on redirect examination, Butler gave some rather confusing testimony suggested that he, Butler, rather than Conklin, made the reference to termination:

> Q. Okay. But in your conversation with Mr. Conklin, did you ask about filing a grievance?
> A. No, I said — this is what I said. I said if we don't disagree with it — because I was still upset with it because I did not feel like it was insubordination. I said so if we don't accept it and file a grievance, you know, what — it's termination.

But then Butler appeared to contradict that testimony:

> Q. Who said termination?
> A. I didn't say termination. Mr. Conklin.

In view of this testimony, as well as the differences between Butler's pretrial affidavit and his testimony at hearing, I am concerned about the reliability of that testimony.

Moreover, Butler's testimony was not entirely consistent concerning what Havens said during the July 2, 2020 meeting. At first, Butler testified that Havens told him that if the Union held the Respondent to the 3-day time limit they wouldn't like the outcome. Later in his testimony, he quoted Havens as saying "if you push this issue on time, I'll terminate him."

This shift may reflect an effort to make his testimony stronger. However, it raises some doubt about the accuracy of the testimony.

Additionally, there is reason to doubt the accuracy of Union Vice President May's testimony. His pretrial affidavit differed from his testimony concerning the date of the meeting with Havens. The affidavit did not mention a meeting with Havens on July 2, 2020, but instead stated the meeting took place on July 3, 2020. At the hearing, May testify that he "was not present on the Friday, July 3rd meeting."

That testimony suggests that there were meetings with Havens on both July 2 and 3, 2020, but other evidence does not support such a finding. More specifically, May's affidavit indicates that on July 3, Union President Butler and Union Business Committeeman James Cagle went to the human resources office to discuss the Murray matter with Havens. However, Butler's testimony does not support a finding that he met with Havens on both July 2 and July 3, 2020.

Although May's affidavit stated that Cagle went with Butler to meet with Havens on July 3rd, Cagle did not testify. The record does not suggest that he was unavailable as a witness. The fact that the General Counsel did not call Cagle to testify also weighs in my consideration of which witnesses to credit.

Havens did testify, and denied, to the best of her recollection, ever meeting with May and Butler concerning Murray. Indeed, she testified that she took no part in the Murray case. That testimony is particularly credible because Havens was in the process of retiring and other human resources personnel were taking over her work.

My observations of Havens' demeanor as she testified also lead me to conclude that her testimony is reliable. Moreover, Havens already had retired at the time she testified and thus did not stand to benefit from giving testimony favorable to the Respondent. For all these reasons, I conclude that Havens testimony is more reliable than that of either Butler or May.

Therefore, crediting Havens, I conclude that she never made the statement alleged in the complaint. Accordingly, I recommend that the Board dismiss the allegation in complaint paragraph 7(a).

Complaint Paragraph 7(b)

Complaint paragraph 7(b) alleges that about "July 9, 2020, Respondent, by Operations Leader Nick Conklin, threatened terminating an employee if the Union filed a grievance over the employee's discipline." The Respondent denies this allegation.

Butler testified that on July 9, 2020, he met with Operations Leader Conklin. According to Butler, he said to Conklin "so what if we don't go with this and file a grievance. And he was like it basically would be termination."

Conklin testified that he told Butler that they were willing to make Murray "an offer that would return him to work on a one–time, unprecedented setting basis." According to Conklin, Butler then asked what would happen if Murray didn't agree, and Conklin replied that they would proceed with termination.

Conklin denied threatening to terminate Murray if the Union filed a grievance. Based on my observations of Conklin as he testified, and for the reasons already given concerning my doubts about the reliability of Butler's testimony, I credit that of Conklin.

Therefore, I conclude that Conklin never made the threat alleged in the complaint.

It also would be illogical to conclude that Conklin's words to Butler constituted a threat to retaliate against an employee for filing a grievance. As a practical matter, they already were negotiating the resolution of a grievance, although it was a grievance not yet reduced to writing.

An offer to settle the grievance necessarily implies that the Union would not be filing another one. Once the Union agreed to a resolution of a grievance, there would be nothing left to grieve. A grievance settlement necessarily implies that the Union will not file another grievance on the same issue.

Moreover, as a matter of timing, the Union would not file a grievance concerning the discharge of Murray until after it had happened. The discharge would not be retaliation for filing a formal grievance but rather the reason to file one.

For these reasons, I conclude that Respondent did not violate the Act in any manner, and recommend that the Board dismiss the complaint.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law,

and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.